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FILED
NOV 1 1955
HAROLD B. WILLEY, Clerk

No. 122

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

WILLARD L. GLEESON and
MARY F. GLEESON,
Petitioners,

vs.

FRED E. CARR, Trustee in Bankruptcy, of the Estate of Broadcasting Corporation of America, Debtor,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To The Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

COME NOW Willard L. Gleeson and Mary F. Gleeson and petition for rehearing, and in respect thereto set forth as follows:

1. Sections 128 and 236 of the Bankruptcy Act have been unconstitutionally construed and applied in the court below, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

The question, of controlling importance in the law of bankruptcy, has not been, but should be determined by this Honorable Court.

The Fifth Amendment to the Constitution of the United States provides under its due process clause that Notice and an Opportunity to be Heard are of the first essentials of due process of law.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

In bankruptcy the act provides for notice to be given by the Referee or under the direction of the Court and for a hearing on such notice. These are basic requirements of due process.

However, in this case, the only notice that the corporation, (which had petitioned for reorganization under Chapter X of the Bankruptcy Act), would be adjudicated a bankrupt, was in a broad, general Notice to Creditors of a Reorganization Meeting called by the *Trustee* to consider reorganization. No creditor, stockholder, or other person could determine from this notice that one year later and without any further notice, bankruptcy would be decreed.

We ask the Court to examine the so-called "Notice" from the Trustee, appended at the back of our original Petition for Certiorari, to determine whether such "notice" by a trustee of a meeting to consider reorganization, is such notice for a hearing a year later to determine whether bankruptcy should result as Congress contemplated, and whether an adjudication of

bankruptcy which followed a year later comports with due process guaranteed by the Fifth Amendment.

It is our position that the Bankruptcy Act requires two notices and *two* hearings, each on separate notice and separate hearing, before adjudication may follow. This did not take place in this case.

Constitutionally construed, we contend, Sections 128 and 236 of the Bankruptcy Act require:

(1) Notice of hearing on a plan of corporate reorganization. This is an effort to preserve the corporate entity.

(2) A second and separate notice and hearing on whether the reorganization has failed and adjudication should follow, and the assets of the corporation sold or liquidated. Any other procedure is sham and a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

(1) This is so because in reorganization of a corporation the purpose is to save it by reorganization and to preserve it in its original form by reorganization. The objectives are entirely different, than

(2) Bankruptcy; where the objectives are to sell and distribute the assets for the benefit of creditors and *liquidation,* not *reorganization,* are its objectives.

Such a second procedure requires separate, specific notice and hearing on such specific notice that bankruptcy is contemplated. On such second notice and hearing this debtor would have an opportunity to show

that he was really not insolvent and should not be adjudicated.

Here, the petition for reorganization shows that the assets of the corporation were $595,566.89 and the liabilities were $195,392.00, and it was because of only being short of cash a proper case for reorganization. No separate hearing or notice was held before adjudication, giving an opportunity to the creditors and stockholders to show that the revised figures on which adjudication was based, were erroneous.

In respect to the hearing under Section 236, the United States Court of Appeals for the Ninth Circuit, in construing Section 236, held that:

> "§236 coincides with the fundamental essentials of due process that unless notice is given and a hearing held and an opportunity to be heard is accorded the parties affected, an adjudication of bankruptcy must be reversed. *Sylvan Beach v. Koch,* 8 Cir. 1944, 140 F. 2d 852; *In re American Bantam Car Co.,* 3 Cir., 1952, 193 F. 2d 616."

But, the Circuit Court did not apply the facts of this case to its own construction of the statute. We assert that Section 236 has been unconstitutionally applied. The only notice in this case was a notice by a trustee "Re Plan" (R. 295). This notice was "In Proceedings for the Reorganization of a corporation—No. 53024-WB" (R. 295).

A person of ordinary intelligence could look in vain for any "notice of a hearing for the purpose of bankruptcy."

Section 236 (2) of the Bankruptcy Act only provides that an adjudication can take place "after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate . . . ."; but there was no judicial designation at any time after the trustee held a meeting "Re Plan" and no further or separate notice that any one could know that bankruptcy was contemplated.

The statement of the United States Court of Appeals that

> "The fact that the notice was coupled with other notices regarding the reorganization proceeding presents no difficulties in view of §120 of the Act, 11 U.S.C.A. §520."

ignores the express provisions of Section 236 that *there must be notice to such persons as the judge may designate* before an adjudication, and it also ignores the words "whenever feasible" in Section 120 to combine one notice with another notice.

We do not think that Congress intended that a notice of a prospective adjudication should be combined with a notice of reorganization, and it would be an unconstitutional application in this case since such a combined notice would involve two separate proceedings on two separate dates, about a year apart, and here the notice was as to only one proceeding on one date a year before.

We think the questions herein involved are of fundamental importance and present substantial consti-

tutional grounds available to petitioner under the Fifth Amendment to the Constitution of the United States, which we did not adequately present. Since filing our previous petition the Court of Claims has taken testimony fully in accordance with House Legislation H.R. Res No. 284 (a possible substanced asset) and that matter is now pending in that Court.

We pray for rehearing.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

MORRIS LAVINE hereby certifies that the foregoing Petition for Rehearing is filed in good faith and not for the purposes of delay and is based upon substantial grounds available to peteitioner although not previously adequately presented, and is restricted to the grounds specified.

MORRIS LAVINE